

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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OAKLAND COUNTY PROSECUTOR,

Plaintiff-Appellee,

v

MARC SEAY,

Defendant-Appellant.

UNPUBLISHED

June 21, 2007

No. 271185

Oakland Circuit Court

LC No. 2006-072617-CZ

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Before: Whitbeck, C.J., and Wilder and Borrello, JJ.

PER CURIAM.

In this civil action for injunctive relief brought pursuant to the incompatible offices act (IOA),<sup>1</sup> defendant Marc Seay appeals as of right from the trial court's order granting summary disposition in favor of plaintiff Oakland County Prosecutor pursuant to MCR 2.116(C)(10). We affirm.

**I. Basic Facts And Procedural History**

Seay began working as a firefighter in the city of Pontiac in 1992. As President of the local firefighter's union, he was the drafter and chief union-side negotiator for the collective bargaining agreement (CBA) with Pontiac that became effective on July 1, 2002. On November 8, 2005, Seay was elected to serve on the Pontiac City Council, and he took office in January 2006. In February 2006, the prosecutor brought this action to compel Seay to resign from either his position as a firefighter or his position as a city council member, asserting that the positions are incompatible under the IOA. Although the CBA officially expired June 30, 2004, its provisions remained in effect when this suit was filed because a new agreement had not been reached. The trial court granted summary disposition in favor of the prosecutor finding Seay's positions were incompatible because they resulted in a breach of duty of public office. The trial court ordered Seay to vacate one of the positions.

**II. Summary Disposition**

Summary disposition is appropriate under MCR 2.116(C)(10) when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is

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<sup>1</sup> MCL 15.181 *et seq.*

entitled to judgment as a matter of law.” In ruling on a motion for summary disposition under MCR 2.116(C)(10), “a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the non-moving party.”<sup>2</sup> This Court reviews de novo a trial court’s ruling on a motion for summary disposition made pursuant to MCR 2.116(C)(10).<sup>3</sup>

### III. Supporting Affidavits

#### A. Legal Standards

Seay asserts that summary disposition was inappropriate because the documentary evidence that the prosecutor offered in support of the motion for summary disposition was not supported by authenticating affidavits. The moving party has the initial burden of supporting its motion for summary disposition with admissible evidence under MCR 2.116(C)(10).<sup>4</sup> The documentary evidence to be considered by the trial court in deciding a motion brought pursuant to MCR 2.116(C)(10) includes the complaint and the exhibits attached thereto.<sup>5</sup> “A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10).”<sup>6</sup>

#### B. Applying The Standards

The purpose of the documentary evidence requirement is to help the court decide whether an issue of fact exists. It is not to be used to resolve an issue of fact.<sup>7</sup> Thus, the court rules permit such documentary evidence to “be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion.”<sup>8</sup>

Here, Seay has not shown that the content and substance of the exhibits supporting the prosecutor’s motion were inadmissible. The CBA and the city council meeting were relevant to the question of whether Seay’s positions violated the IOA. We are unable to discern any reason the content of these documents would be inadmissible. Further, the trial court could simply take

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<sup>2</sup> *Scalise v Boy Scouts of America*, 265 Mich App 1, 9; 692 NW2d 858 (2005).

<sup>3</sup> *Id.* at 10.

<sup>4</sup> *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996).

<sup>5</sup> *Farm Bureau Mut Ins Co v Blood*, 230 Mich App 58, 66; 583 NW2d 476 (1998).

<sup>6</sup> *Richards v Tibaldi*, 272 Mich App 522, 529; 726 NW2d 770 (2006).

<sup>7</sup> *SSC Assoc Ltd Partnership v Gen Retirement Sys of Detroit*, 192 Mich App 360, 364; 480 NW2d 275 (1991).

<sup>8</sup> MCR 2.116(G)(6). See also *Maiden v Rozwood*, 461 Mich 109, 124; 597 NW2d 817 (1999) (noting that the Michigan Supreme Court’s interpretation of MCR 2.116[C][10] is consistent with the federal evidentiary standard for summary judgment, wherein references to the fact that evidence must be admissible are references to the content of the evidence not the form of the evidence).

judicial notice of the Pontiac charter provisions.<sup>9</sup> Accordingly, we conclude that the trial court did not violate MCR 2.116(G)(6), and the prosecutor’s motion was adequately supported by the documentary evidence proffered in accord with MCR 2.116(G)(3)(b), including the pleadings and the exhibits attached thereto.

#### IV. The IOA

##### A. The Provisions Of The IOA

Seay also challenges the substance of the trial court’s decision. The IOA prohibits a public officer<sup>10</sup> or public employee<sup>11</sup> from holding incompatible offices.<sup>12</sup> “Incompatible offices” are defined to be

public offices held by a public official which, when the official is performing the duties of any of the public offices held by the official, results in any of the following with respect to those offices held:

- (i) The subordination of 1 public office to another.
- (ii) The supervision of 1 public office by another.
- (iii) A breach of duty of public office.<sup>[13]</sup>

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<sup>9</sup> MRE 202.

<sup>10</sup> MCL 15.181(e) defines the term “public officer” as someone elected or appointed to:

- (i) An office established by the state constitution of 1963.
- (ii) A public office of a city, village, township, or county in this state.
- (iii) A department, board, agency, institution, commission, authority, division, council, college, university, school district, intermediate school district, special district, or other public entity of this state or a city, village, township, or county in this state.

<sup>11</sup> MCL 15.181(d) defines the term “public employee” as:

an employee of this state, an employee of a city, village, township, or county of this state, or an employee of a department, board, agency, institution, commission, authority, division, council, college, university, school district, intermediate school district, special district, or other public entity of this state or of a city, village, township, or county in this state, but does not include a person whose employment results from election or appointment.

<sup>12</sup> MCL 15.182.

<sup>13</sup> MCL 15.181(b).

The phrase “public offices held by a public official” encompasses positions held by public employees.<sup>14</sup> The IOA includes a list of exceptions to its general prohibition.<sup>15</sup> However, the list of exceptions in § 3 of the IOA “does not apply to allow or sanction activity constituting conflict of interest prohibited by the constitution or laws of this state.”<sup>16</sup>

In the context of the IOA, “a breach of duty would occur when the simultaneous holder of two public offices failed to protect, advance and promote the interests of both public offices.”<sup>17</sup> In determining whether a breach of duty of public office has occurred, the focus must be on “the manner in which the official actually performs the duties of public office.”<sup>18</sup> As explained by the Michigan Supreme Court, under the IOA

incompatibility exists only when the performance of the duties of one of the public offices “results in” one of the three prohibited situations. By using the phrase “results in,” the Legislature clearly restricted application of the statutory bar to situations in which specified outcomes or consequences of a particular action actually occur. That a breach of duty *may* occur in the future or that *potential conflict* exists does not establish incompatible offices. The official’s performance of the duties of one of the offices must actually result in a breach of duty.<sup>19]</sup>

#### B. Applying The IOA

As an elected member of the Pontiac City Council and an employee of the Pontiac Fire Department, Seay was both a public officer and a public employee under the IOA. Thus, he held two public offices as a public official, which are incompatible if, when he performs the duties of either position, the result is the subordination of one of the offices, the supervision of one of the offices by the other, or a breach of duty of one of the offices.<sup>20</sup>

Here, the trial court did not reach the issues of subordination and supervision, because it concluded that performing either position resulted in a breach of duty of the other position because Seay could not protect and advance the interests of both simultaneously. None of the exceptions provided in MCL 15.183 to the general rule of incompatibility is claimed to be applicable to the facts presented here.

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<sup>14</sup> *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 161; 627 NW2d 247 (2001).

<sup>15</sup> MCL 15.183.

<sup>16</sup> MCL 15.183(6).

<sup>17</sup> 1979-1980 OAG No 5626, p 543 (January 16, 1980); *Murphy*, *supra* at 164.

<sup>18</sup> *Murphy*, *supra* at 164.

<sup>19</sup> *Id.* at 162-163 (footnote omitted, emphasis in original).

<sup>20</sup> MCL 15.181(b).

Seay argues that because the Pontiac charter requires him to abstain from voting on issues related to the fire department to avoid a conflict of interest,<sup>21</sup> his positions will not be competing. He further argues that his abstention does not cause him to be in breach of his official duties as a council member. Rather, according to Seay, because of the charter provision requiring his abstention he will be acting in accord with his official duties.

The distinction between an incompatibility of office and a conflict of interest has been explained as follows:

“Incompatibility of office or a position is not the same as conflict of interest. Incompatibility of office or position involves a conflict of duties between two offices or positions. While this conflict of duties is also a conflict of interest, a conflict of interest can exist when only one office or position is involved, the conflict being between that office or position and a nongovernmental interest. Incompatibility of office or position requires the involvement of two governmental offices or positions. Moreover, incompatibility of office or position may be sufficient for a vacation of an office when conflict of interest is not.”<sup>[22]</sup>

Pontiac’s annual budget and appropriations ordinance must be submitted to the city council.<sup>23</sup> The council also has control over city payroll such that “[n]o compensation or salary shall be paid to . . . employees of the City except as approved by the Council.”<sup>24</sup> Accordingly, in his capacity as a city council member, Seay not only has final say on the compensation package provided to firefighters employed by the city, he must annually review city appropriations, including those made to the fire department. These provisions of the city charter are certain to require action by Seay, and accordingly create more than a mere possibility of conflict.

In fact, the prosecutor presented evidence indicating that Seay actually voted on matters concerning the fire department, including a resolution restating, in accord with the city charter, that no compensation be provided to city employees without approval from the city council, and a resolution to approve a “lease/purchase agreement” to obtain a new tower truck and related equipment for the fire department. Further, it appears that the union Seay belongs to as a firefighter and the city were actively engaged in negotiations regarding a new collective bargaining agreement to replace the expired agreement they were working under. Under these circumstances, it is apparent that Seay cannot simultaneously protect, advance, and promote the interests of both of the public offices in which he serves because of his divided loyalties.<sup>25</sup>

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<sup>21</sup> Pontiac charter, art VI, ch 1, § 6.107.

<sup>22</sup> *Contesti v Attorney General*, 164 Mich App 271, 281; 416 NW2d 410 (1987), quoting 63 Am Jur 2d, Public Officers and Employees, § 79, p 728.

<sup>23</sup> Pontiac charter, art V, ch 1, § 5.102.

<sup>24</sup> Pontiac charter, art III, ch 1, § 3.120.

<sup>25</sup> *Murphy*, *supra* at 164-166; 1979-1980 OAG No 5626, p 542-543 (January 16, 1980).

The fact that the city charter requires council members to avoid participating in, acting on, or voting on matters in which they have a conflict of interest, does not reduce the incompatibility of Seay's positions. While Seay may abstain from participating in certain matters to avoid a conflict of interest, because of the charter provisions requiring action by the city council on some matters, there is an inherent incompatibility between his positions that cannot be alleviated by abstention because the abstention is itself a breach of Seay's duty to promote, protect, and advance the position of the city as a member of council. In other words, while Seay's conflict of duties is also a conflict of interest, curing the conflict of interest in accord with the city charter does not cure the conflict of duties under the IOA.<sup>26</sup>

As stated by the Attorney General:

[A] public official's abstention from the responsibilities of his or her office in order to avoid participating in the approval of both sides of an agreement between the two public entities which he or she serves is itself a breach of duty. Only vacation of one office will resolve the public official's dilemma.<sup>[27]</sup>

The same reasoning holds true not just when the approval of an agreement between two public entities is at issue but more broadly when a public office holder is unable to reconcile competing responsibilities without breaching a duty of public office.<sup>28</sup>

Here, Seay was in a position where he would have to set aside his loyalty to the fire department and his duty to advocate for funding on behalf thereof to fairly participate in the ongoing collective bargaining agreement negotiations and to vote on competing appropriation requests from other departments. Seay's duty of loyalty to the fire department and his duty of loyalty to the city as a whole cannot be reconciled without violating the IOA because abstention from participation in these matters is itself a breach of duty of public office. Thus, the trial court reached the correct result and properly concluded that Seay's positions are inherently incompatible and that vacation of one of the positions he held was required.

Affirmed.

/s/ William C. Whitbeck  
/s/ Kurtis T. Wilder  
/s/ Stephen L. Borrello

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<sup>26</sup> *Contesti, supra* at 281.

<sup>27</sup> 1979-1980 OAG No 5626, p 545 (January 16, 1980).

<sup>28</sup> See *Contesti, supra* at 281-282 (finding the plaintiff violated the IOA when he was placed in the position of aiding competing budgetary requests).